

The Odd Advantage of Reliable Enemies

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One of the nice things about the Cold War was that we could nearly always tell who were our friends and who were our enemies. There were certain countries we could more or less count on to take our side, and others that regularly opposed us. It is, however, more complicated now. If we could previously take the opposition of countries in the Communist bloc for granted, we are now able to look to those same countries for occasional support. With such nations potentially willing to side with us on selected issues, we have fewer "reliable enemies."

The situation seems cause for celebration, and in many respects, it probably is. There is, however, one consequence of this new potential for alliance that poses an unexpected disadvantage. With the transformation of reliable enemies into occasional allies, we are no longer in the position of safely demanding their adherence to international law. Instead, we are drawn into making concessions in order to keep them on our side. In the international legal arena, reliable enemies can be useful for the simple reason that it is easier to take positions of principle against enemies than against friends.

A striking example of this phenomenon was the need of the United States government to gain the support of the United Nations for the resolution authorizing use of force in the Persian Gulf. China, in a position to use its veto power to thwart this objective, did not veto the resolution, and many speculated that the United States had traded an implicit agreement not to press China over its domestic human-rights violations. The possibility of cooperation on one issue undercuts willingness to take a principled stand on another. Had the United States taken China's opposition on the Persian Gulf for granted, it would have had no reason to "go easy" on China for its earlier violations of human rights. Conversely, had China perceived the United States as an implacable enemy quick to capitalize on China's human-rights transgressions, the Chinese would have had no incentive to cooperate over the Persian Gulf resolution.

No one can doubt that the ability to strike deals can be quite useful. At the same time, however, fashioning deals involves a willingness to make concessions, and states further their objectives only by helping

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other states to further their own. Although such pragmatic behavior need not in itself cause problems, the concessions often involve acquiescence to violations of international law. Are states entitled to acquiesce in one another's violations of international law? Just how and why this problem comes about raises important questions as to how we should conceptualize the enforcement of international law.

I. BARGAIN MODELS AND PRINCIPLE MODELS OF INTERNATIONAL LEGAL ENFORCEMENT

To some, the question whether states have an *obligation* to protest violations of international law by other states may seem like an odd question. The more commonly asked question is whether states have a *right* to involve themselves in legal enforcement at all. The injured state itself has, of course, a right to pursue all available legal remedies. But the right of third-party states to become involved is less firmly established. Indeed, many claim that such a right is truly exceptional.¹ Why then should we go one step further and intimate that not only a right, but also a duty of intervention may exist?

It is undeniable that third-party states are more limited in their powers to enforce international law than the victims themselves. Standing requirements, for instance, restrict certain remedies to the party suffering the legal injury.² But it still makes sense to ask about third-party obligations, for at least two reasons. First, some provisions of international law provide rights *erga omnes*, that is, rights that run to the international community at large. While it is unclear exactly what enforcement rights of third parties are appropriate when an *erga omnes* norm is violated,³ third-party states seem to have some claim to intervene and therefore the issue of a duty to intervene arises.

Second and perhaps more importantly, limits on third-party remedies are not equally applicable to remedies of all varieties. When the remedy indicated is international adjudication, doctrines such as standing are clearly pertinent. But such limitations are not as obviously relevant when the remedy under consideration is an informal diplomatic or political remedy. Suppose, for instance, that the United States were to violate the international legal limits on extraterritorial appli-

1. See, e.g., Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L. LAW 57, 61, 96, 99 (1989).

2. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 902, comment a, n.1 (1987) [hereinafter RESTATEMENT (THIRD)]; *Barcelona Traction, Light, & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Judgment of Feb. 5); *South West Africa (Ethiopia v. S. Afr., Liberia v. S. Afr.)*, 1966 I.C.J. 6, 32-35 (Judgment of July 18).

3. See, e.g., Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 431-33 (1983); see generally THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 188-201 (1989).

cation of its own laws.⁴ Although the direct victim of the violation may be a British citizen, France and Germany are not necessarily prohibited from lodging protests. This result does not stem from the violation being identified as *erga omnes*, but rather from the notion that doctrinal limits are not clearly relevant to diplomatic or political remedies.⁵

It is ironic that international lawyers writing about international remedies typically tend to focus on remedies of a more formal sort. While such remedies may come to mind more readily to writers who are, after all, trained in the law, this very focus undercuts the international system's claim to legality.⁶ Faced with the claim that the international system is based on power politics rather than law, international lawyers are quick to point to the wide range of informal remedies that supplement formal legal ones.⁷ Informal remedies provide necessary support for the claim that the international legal system should be taken seriously.

Once we recognize the wide range of permissible third-party remedies, it makes sense to ask whether they are obligatory under any circumstances. There are two possible approaches to this issue. Under the bargain model, states themselves are to decide which provisions of international law are worth enforcing, and they may choose not to intervene because intervention would not be to their advantage. Although they possess the option to pursue remedies, they are not bound to. Under the principle model, the parties may not make concessions and trade-offs about whether international law should be observed. Rather, international law is to be enforced "as written." In essence, states have an obligation not to acquiesce to violations of international law and are not free to take positions contrary to international legal principles.

The principle model seems to be the more intuitively appealing method of international legal enforcement. Bargaining over international legal sanctions seems objectionable because it involves sacrificing the interests of third parties. Even if we are ready to allow two states to bargain away their own international legal rights, that does not mean that they should have the right to bargain away the international rights of other states.

Given the fact that centralized enforcement mechanisms are lacking, treating international enforcement as a matter of principle seems par-

4. See RESTATEMENT (THIRD), *supra* note 2, § 402.

5. Lea Brilmayer, *Reviews of Restatement (Third) of Foreign Relations Law of the United States: International Remedies*, 14 YALE J. INT'L L. 579 (1989).

6. *Id.* at 582-83.

7. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE* 2 (2d ed. 1979) (diplomacy is the primary method for ensuring observance of international law).

ticularly desirable. Absent a centralized enforcement mechanism, aggrieved states may have no recourse but to appeal to sympathetic nations that are offended by the wrong suffered by the aggrieved nation. Pressure from other states is one of the few viable methods of legal enforcement. Such strategies only work while these other nations continue to take a stand on principle, rather than acquiescing whenever that is convenient. If other nations can bargain away their objections to international violations, there will be few incentives to aid those whose rights have been violated.

Despite the obvious appeal of the principle model, it does not seem descriptively accurate. Nations commonly disregard injuries that other nations have suffered on the grounds that pressuring the violators would be inconvenient or would undercut other foreign policy objectives. The desire of the United States to achieve unanimity on the condemnation of Iraq's invasion of Kuwait may have resulted in acquiescence to both Syria's involvement in the Lebanon war and support for United Nations resolutions criticizing Israeli deportations of Palestinians, as well as the aforementioned tolerance of Chinese human-rights violations. Perhaps these were principled stands that would have been taken apart from the Gulf crisis, although skepticism on this point is certainly within the bounds of reason. It would be hard to deny that nations sometimes make pragmatic considerations when deciding whether to bring pressure to bear on international violators.

And such bargaining is much more likely to take place between friends than between enemies. The United States is more likely to look the other way when human-rights questions arise today in China or the Soviet Union than when they arose in the past. There are greater incentives still to disregard human-rights problems in El Salvador. It is easier for the United States to denounce a nation publicly for violating international law when there is no expectation that the United States may have to rely on that same nation a month later for support. Reliable enemies are convenient because you can criticize them without having to worry that they will not be there when you need them. Reliable enemies won't be there regardless of what you do.

Of course, bargaining is not absolutely impossible even with a reliable enemy. There are, however, several reasons why it is more difficult. For one thing, it is unseemly to bargain publicly with consistent opponents. This is particularly true in a democracy, where voters are likely to be appalled by negotiations with apparently implacable enemies. Recall the outrage in the United States over the secret arms sale to Iran. Bargaining with enemies is also difficult because you are less able to rely on their carrying out promises. In an ongoing cordial relationship, one can more easily count on performance

as promised because the other party will not want to forgo the good will it has built up in the past.

Admittedly, such things are always a matter of degree. There are few enmities so solid as to preclude completely any possibility of cooperation. During the Cold War, even the worst enemies must have contemplated that they might need to work together at some point. Similarly, the end of the Cold War did not make all alliances equally likely; it is still possible to predict with some degree of precision which nations you can afford to offend. Nonetheless, the general point remains. The more likely that two nations will need each other in the future, the less likely they will be willing to confront each other over some issue deemed to be inessential. And each will be more likely to overlook the other's international transgressions against a third.

II. THE CHOICE BETWEEN BARGAINING AND PRINCIPLE

Would it be desirable to reduce the ability of states to make concessions regarding the legal violations of others? Should we try to find mechanisms to discourage such connivances? Do states have obligations to try to remedy international violations?⁸ Which model is better, the bargain model or the principle model? Ultimately, the answers to these questions depend on fundamental issues regarding what international law is all about. Exaggerating somewhat for purposes of emphasizing the contrast, I will lay out the opposing arguments for the two frameworks.

The central argument for principle is this: states ought to be obliged to bring pressure to bear on violators of international law because, in the end, this is the most effective way to enforce international law. It is cynical and contrary to the idea of law that states should trade concessions over violations of international law. The aggrieved state should be able to count on the assistance of other nations to vindicate its rights. In a decentralized system of enforcement, no other mechanism is likely to be available.

The major argument for bargaining is that international law ultimately rests on the consent of states. According to this view, state sovereignty is the core value of the international system, and no state may be bound against its will. In recent times, it has been argued that some norms of international law are *ius cogens* and override even

8. The question here is not limited to legal obligations. Outside of a few limited areas (see *infra* note 10), it would be difficult to argue that states currently have legal obligations to intervene to correct international violations. Instead of focusing on legal obligations, I mean to pose the question of whether states have moral obligations, and I would like to ask whether we ought to move international law towards a greater recognition of these moral obligations.

the express wishes of states.⁹ But even if one were to recognize the special status of *ius cogens*, it would still be possible to argue that the enforcement of the remaining norms of international law is entirely at the discretion of other states. If international law were binding only with the consent of states, then states should arguably be able to choose not to enforce it against one another.

The argument between bargain and principle has close parallels to the long-running dispute over why and whether international legal norms are binding on states in the first place. Yet, despite the similarity of these two disputes, they are not identical. In opposing bargain to principle, we are asking not whether the state contemplating a violation is bound, but whether *other* states are bound to condemn the violation when they prefer not to do so. Within the scope of this short essay, it is not possible to examine the larger jurisprudential issues regarding the status of rules established by state consent. I will, however, suggest a few ways in which the question of an obligation to help enforce international law differs from the question of an obligation to obey international law.

For one thing, there is generally a greater recognition of a duty to obey than a duty to aid in the enforcement of international law. States seem to recognize—at least in theory—that they have obligations to obey international law, and they regularly make efforts to show how their actions are consistent with international law. At least at the level of platitude, most states assert their fidelity to international legal norms. By contrast, there seems to be less consensus about a duty to help in the enforcement of international law when other states violate it. Rather, the general assumption seems to be that it is acceptable to remain uninvolved and simply watch while others violate the law undeterred.

Second, the duty to abide and the duty to aid in enforcement are conceptually distinct. Even states that have consented to abide by international law have not specifically consented to help enforce it. Treaties typically spell out the obligation of the signatories to comply with the treaty. But by signing a treaty, the parties rarely make an additional explicit promise to pressure others to comply with its terms.¹⁰ An additional implicit promise would have to be inferred.

9. Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 9 (1986).

10. For example, the United Nations can call upon states to assist in carrying out sanctions, as it did after the invasion of Kuwait. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 55–58 (Advisory Opinion of June 21) (sanctions adopted by the Security Council against South Africa were binding on all nations and required their affirmative support); Charney, *supra* note 1, at 84 (discussion of the Draft of the International Law Commission on State Responsibility and the obligation to support enforcement actions).

Third, the distinction between the obligation to obey and the obligation to aid in enforcement is reflected in domestic law. Citizens are expected to obey the law but do not expect to have to take law enforcement into their own hands. Of course, in the domestic context, this may be due to the adequacy of domestic enforcement mechanisms. And it is arguable that because no comparable mechanism exists internationally, states may have a greater obligation to involve themselves in enforcement. But even if the analogy between domestic and international noninvolvement is mistaken, it may nevertheless explain why noninvolvement seems to be condoned. Indeed, the very fact that the right of other states to become involved in enforcement is controversial reflects an awareness that there are policies in international law, as in domestic law, cautioning participants not to take the law into their own hands.¹¹

A final reason that enforcement differs from compliance is that the enforcement obligation is more indefinite than the compliance obligation. It is not entirely clear, for example, which nations are supposed to intervene, and how far they are obligated to exert their pressure on violators. Even if a general obligation of enforcement existed, this would not help identify any particular state to commence enforcement. And when a violation occurs, states may be tempted to wait to allow other states to take the initiative in enforcing the law. If an individual state waits, it can "free ride" by allowing other states to bear the costs of enforcement. Alternatively, a state may claim that the measures it has taken already satisfy its obligation to assist. Unless the enforcement obligation can be expressed more concretely, it will be difficult to determine when a state has satisfied its international responsibilities.

All of these arguments support the bargain model over the principle model. Another consideration, however, leans in the other direction. The bargain model may be self-defeating because it undermines international law in a way that makes further bargaining more difficult. Essentially, underenforced international norms lose credibility and cannot provide the basis for bargaining in the future.

Under the bargain model, certain norms are more likely to be underenforced than others. The norms most likely to suffer underenforcement are primarily those of greater value to the violating state

against international crimes). Sometimes the international agreement itself spells out enforcement obligations. See, e.g., Luigi Condorelli & Laurence Boisson de Chazournes, *Quelques remarques à propos de l'obligation des états de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances,"* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET (Christophe Swinarski ed. 1984) (discussing sections of Geneva Conventions obliging third parties to assist in their enforcement); MERON, *supra* note 3, at 29-31.

11. Charney, *supra* note 1, at 89; MERON, *supra* note 3, at 201, 214. .

than to the enforcing states. Here, the "gains from trade" of forbearance are substantial, for the violator has more to gain from the violation than the other states stand to gain from preventing the violation. Human-rights abuses pose an obvious example. The consequences of human-rights violations are primarily domestic; as a result, enforcing states have little directly at stake, while the violating state is deeply involved. Whichever norms fall into this category, the end result of the bargain model is likely to be a stripped-down version of international law. Norms that are of greater interest to the violator than to other states will fall by the wayside, leaving only the norms that mean less to the violator than to the enforcing states.

The bargaining model will for this reason be at least partially self-defeating. Once a pattern of nonenforcement of certain norms is established, their value as bargaining chips is reduced. If the United States, in an effort to induce support for its other foreign-policy objectives, systematically looked the other way regarding violations of human-rights norms, a pattern would quickly be established and the United States would no longer have a concession to make in order to induce the support it wanted. If the United States fails to pressure China or El Salvador on their human-rights records, it will eventually lose the ability to make credible threats of pressure on human-rights issues. This is true for several reasons, including the evident hypocrisy of picking and choosing the point at which to raise the issue of human rights. The obvious interpretation of such behavior is a cynical one—one that would likely not play well either at home or abroad. Further, norms are devalued by going unused, and quickly fade from memory. We expect principles to be applied consistently and not arbitrarily whenever they are convenient or advantageous. When norms are inconsistently followed, they simply lose their character as norms.

Is this, then, where losing our reliable enemies leads us? Academics find it easy enough to speculate about the long-run trends that may, in theory, come to pass. Experience has a way of thwarting these predictions, and highly conceptual models do not necessarily have any relevance to the concrete world. It does seem, though, that the choice between principled enforcement and bargained concessions is a real one. And it also seems clear that we are more likely to raise principled objections of international law against our enemies than against our allies. Although some other ideological rift may step in to impose different entrenched alignments, for now at least, the demise of the Cold War has contributed to a situation in which we have fewer reliable enemies. The principle model of legal enforcement—to the extent that it has current adherents—is one likely victim.